ELIZABETH DAY, Bar No. 177125
elizabeth.day@dlapiper.com
GREGORY J. LUNDELL, Bar No. 234941
greg.lundell@dlapiper.com
DLA PIPER US LLP
2000 University Avenue
East Palo Alto, California 94303-2214
Tel: 650.833.2000
Fax: 650.833.2001

JOHN R. HURLEY, Bar No. 203641
john.hurley@dlapiper.com
DLA PIPER US LLP
153 Townsend Street, Suite 800
San Francisco, CA 94107-1957
Tel: 415.836.2500
Fax: 415.836.2501

THOMAS G. PASTERNAK (pro hac vice)
thomas.pasternak@dlapiper.com
R. DAVID DONOGHUE, (pro hac vice)
david.donoghue@dlapiper.com
DLA PIPER US LLP
203 North LaSalle Street, Suite 1400
Chicago, IL 60601-1293
Tel: 312.368.4000
Fax: 312.236.7516

Attorneys for Defendants
ALEXA INTERNET, INC. and NIALL O'DRISCOLL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GIRAFA.COM, INC.,

Plaintiff,

v.

ALEXA INTERNET, INC.; NIALL O'DRISCOLL ,

Defendants.

CASE NO. CV 08-02745 RMW

REPLY IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFF'S THIRD CLAIM FOR RELIEF

CAL. CODE CIV. PROC. § 425.16

Date: September 5, 2008
Time: 9:00 am
Dept: 6, 4th floor
Judge: Ronald M. Whyte

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I. INTRODUCTION

Plaintiff Girafa's third claim for relief directly attacks Defendants for filing a patent infringement lawsuit in Texas (the "Texas Action"), alleging that Alexa's filing and prosecution of that case constitutes "unlawful, unfair and fraudulent conduct" under California's Unfair Competition Law ("UCL"). Bus. & Prof. Code § 17200, et. seq. (Complaint, ¶¶ 33, 35.) This is exactly the type of claim that is subject to California's anti-SLAPP statute—the cause of action is specifically intended to chill and burden protected rights to petition the courts for redress, such as here, where all Alexa has done is file a patent lawsuit against Girafa. It should come as no surprise to Girafa that Alexa owns intellectual property and that Alexa would take steps, including the commencement of a lawsuit, in order to protect that intellectual property from infringers such as Girafa.

In opposition to Defendants' special motion to strike, Girafa has done nothing to remove the claim from the ambit of the anti-SLAPP statute. Girafa has not established that the claim falls within any exception to the anti-SLAPP statute, and it has not established a probability of success on the merits. To the contrary, Girafa's claim based on the filing and prosecution of a still-pending lawsuit is absolutely barred as a matter of law. Girafa has no legal basis for its Third Claim for Relief, and it should be stricken without leave to amend.

II. LEGAL ARGUMENT

A two-step procedure applies to the evaluation of an anti-SLAPP motion. *See, e.g. Kashian v. Harriman*, 98 Cal. App. 4th 892, 905 (2002). All that is required to strike a cause of action is that: (a) the defendant make a *prima facie* case that the cause of action arises primarily from protected activity; and (b) the plaintiff is unable to demonstrate the underlying merit of the claim if all evidence proffered by the parties in support of and in opposition to the motion is given credence. *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002).

In its opposition, Girafa concedes that "the filing of a lawsuit [is normally] within the zone of protected activity," but argues: (1) that its UCL claim falls within an exception to the anti-SLAPP statute; and (2) that its UCL claim has a probability of success on the merits. (Opp. to anti-SLAPP at p. 4:10-13.) Girafa is wrong on both points.

A. Girafa's UCL Claim Is Not Excepted from the Anti-SLAPP Statute.

Girafa argues that its UCL claim falls within an exception to the anti-SLAPP statute. Specifically, Girafa cites to and relies upon Code of Civil Procedure § 425.17(c). (Opp. to anti-SLAPP at pp. 4-22-7:16). In relevant part, that statute provides as follows:

> (c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services … arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services … .
>
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer … .

Cal. Code Civ. Proc § 425.17(c). In sum, this provision creates an exception to the anti-SLAPP statute, and no motion to strike may be granted, where (1) the subject cause of action is based on representations of fact regarding a competitor, or its goods or services, (2) made for the purpose of increasing sales, and (3) the intended audience is actual or potential customers. *See Metcalf v. U-Haul, Int'l*, 118 Cal.App.4th 1261, 1265 (2004).

On the first prong of this exception, Girafa cites *Brill Media Co., LLC v. TCW Group, Inc*., 132 Cal.App.4th 3124, 329 (2005), for the proposition that the filing of litigation can constitute "conduct" that "consists of representations of fact" about a competitor or its goods or services. This argument oversimplifies and misstates the facts and holding of *Brill Media*.

In *Brill Media*, certain bondholders stood to financially gain from the default of Brill Media, which had issued the bonds. *Id*. at pp. 332-333. In order to prevent Brill Media from raising sufficient funds to make payment and to force a default, the bondholders made statements to sabotage Brill Media's attempt to sell off certain assets. *Id*. at pp. 332-336. Brill Media was consequently unable to make the bond payments, and the bondholders then initiated involuntary bankruptcy proceedings upon Brill Media's default. *Id*. at p. 336. Under the circumstances of that case, the court concluded the defendants' statements and act of initiating involuntary

bankruptcy proceedings fell within the commercial speech exemption to the anti-SLAPP statute. *Id*. at p. 342.

A subsequent Court of Appeal decision distinguishes *Brill Media* on its facts. In *Contemporary Services Corp. v. Staff Pro Inc*., 152 Cal.App.4th 1043, 1053-54 (2007), the court declined to follow *Brill Media*, holding that "the act of filing [an] underlying action for defamation and unfair competition does not constitute 'representations of fact about [defendants'] or a business competitor's business operations, goods, or services… .'" Although the cause of action in *Contemporary Services Corp.* was also purportedly based on extra-judicial statements, those statements were not factual representations regarding the operations, goods, or services of the defendant or a competitor. Consequently, the court in that case refused to follow *Brill Media* and found that the subject cause of action was not excepted from the anti-SLAPP statute. *Id.*

Similar to the situation in *Contemporary Services Corp.*, Alexa's act of filing the Texas Action does not in and of itself constitute a representation regarding Girafa, its goods or services. And Girafa does not base its claim on any extra-judicial statements or conduct. Consequently, Girafa's UCL cause of action does not fall within § 425.17(c) and is fully subject to a special motion to strike.

Equally important, *Brill Media* does not assist Girafa on the "audience" requirement for the § 425.17(c) exception. Again, the *Brill Media* case arose not only from the filing of an involuntary bankruptcy petition against Brill Media, but from extra-judicial statements made to third parties. 132 Cal.App.4th at 342-43. In contrast to *Brill Media*, the only statements cited by Girafa here are statements in the complaint in Texas Action. And the only "audience" disclosed by the complaint itself is the court—not an actual or potential customer of any party. (Ex. A to Decl. of John B. Scherling.)[1]

[1] There is no citable case authority directly addressing the issue of which party has the burden of proof on § 425.17 exceptions to the anti-SLAPP statute. *Brill Media* appears to place this burden on the moving party, but the issue was not squarely before the court. Moreover, there is authority for the general proposition that "[o]ne claiming an exemption from a general statute has the burden of proving that he comes within the exemption." *Norwood v. Judd*, 93 Cal.App.2d 276, 282 (1949); *see also In re Lorenzo C.*, 54 Cal.App.4th 1330, 1345 (1997); *Irwin v. Mascott* 96 F.Supp.2d 968, 980 (N.D. Cal. 1999). Ultimately, it does not matter because the only evidence before the court regarding the "audience" for the Texas Action is the complaint in that case, which demonstrates that § 425.17(c) is not applicable.

B. Girafa's Third Claim for Relief Has No Probability of Success on the Merits.

"In order to establish a probability of prevailing on the claim, a plaintiff responding to an anti-SLAPP motion … 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821 (2002) (internal citations omitted); *accord Vogel v. Felice*, 127 Cal.App.4th 1006, 1017 (2005).

In this case, Defendants' anti-SLAPP motion should be granted because Girafa's third claim for relief is not legally sufficient—the face of the complaint discloses an absolute legal bar. Specifically, Girafa cannot assert a claim under California law for the alleged bad-faith filing and prosecution of a lawsuit where that underlying lawsuit is still pending.

1. Girafa Cannot Assert a UCL Claim Based on the Filing and Prosecution of Another Lawsuit That Is Still Pending.

The California Supreme Court has held that a plaintiff cannot assert claims based on the filing and prosecution of a lawsuit until termination of that underlying suit. In *Pacific Gas & Elec. Co. v. Bear Stearns & Co*., 50 Cal. 3d 1118, 1124 (1990) ("*PG&E*"), the Court cited California's strong public policy in favor of providing access to the courts, and reasoned that allowing tort claims based on pending litigation would impermissibly burden the right to petition for redress. *Id*. at 1131, 1137. This Court has followed *PG&E* to dismiss interference claims based on the filing and prosecution of still-pending trademark and patent infringement suits. *Formula One Licensing, B.V. v. Purple Interactive Ltd*., No. C 00-2222 MMC, 2001 U.S. Dist. LEXIS 2968 (N.D. Cal. 2001) (dismissing interference claims based on pending trademark infringement suit); *Visto Corp. v. Sproqit Techs., Inc.*, 360 F. Supp. 2d 1064, 1065, 1072 (N.D. Cal. 2005) (dismissing interference claims based on pending patent infringement suit). Girafa makes two arguments in an attempt to avoid the bar presented by *PG&E*, neither of which have merit.

First, Girafa asserts that "sham litigation" creates an exception to *PG&E*'s requirement of awaiting resolution of the underlying suit. (Opp. to anti-SLAPP at p. 12:17-20.) This argument makes no sense—every claim based on the bad-faith filing and prosecution of a lawsuit is based

on an allegation of "sham litigation." Girafa's argument would render *PG&E* meaningless.

Likewise, there is no authority to support Girafa's argument. Girafa claims that in *PG&E*, "the Court explicitly recognized the *Noerr-Pennington* doctrine exception for 'sham petitions, brought without probable cause for the purpose of harassment,'" and uses this to argue for a "sham litigation" exception to the overall holding of the case. (Opp. to anti-SLAPP at p. 12:17-20.) But there is no basis to make this leap. The Court examined the "sham litigation" exception to *Noerr-Pennington* in fashioning its own test, but expanded on and went beyond the *Noerr-Pennington* exception by requiring that in order to state a claim for relief based on bad-faith petitioning activity, a plaintiff cannot simply allege that "the [underlying] litigation was brought without probable cause," but must also allege "that the [underlying] litigation concluded in plaintiff's favor." *PG&E*, 50 Cal. 3d at 1137.

Girafa's second argument is that the UCL does not fall within the scope of *PG&E*, arguing that "Defendants have cited no case applying *Pacific Gas and Electric* to bar an unfair competition claim premised on bad faith sham litigation." (Opp. to anti-SLAPP at p. 13:2-3.) But the fact that *PG&E* concerned a common-law claim makes no difference. In *Rubin v. Green*, 4 Cal. 4th 1187, 1202 (1993), the California Supreme Court held that the policy underlying *PG&E* applies to both statutory and common-law claims: "[T]he policy of free access to the courts underlying the [litigation] privilege [is] 'equally compelling in the context of common law and statutory claims … there is no valid basis for distinguishing between the two.'" And in *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 12 (1995), the Court of Appeal held that *PG&E* applies to bar any claim based on the filing and prosecution of lawsuit, including the claims for unfair competition that the plaintiff had asserted in that case:

> Although the [*PG&E*] court did not hold that the plaintiff's only remedy against the defendant was a cause of action for malicious prosecution, it did hold that the plaintiff's claims against the defendant must be measured by the standards applicable to a malicious prosecution action. That is, the plaintiff "must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." Thus, for Barstow to prevail it was essential that it provide a *prima facie* case on these points no matter how it chose to label its claims.

Id. at 25 (emphasis added; internal citations omitted; quoting *PG&E*, 50 Cal.3d at 1137). Thus,

the fact that Girafa asserts a statutory UCL claim is of no import—*PG&E* presents an absolute bar while the Texas Action is still pending.

None of the cases cited by Girafa dictate a contrary result. *Monolithic Power Systems, Inc. v. O2 Micro Int'l Ltd*. 2007 U.S. Dist. LEXIS 22556 (N.D. Cal. 2007) does not cite *PG&E* or discuss the issue currently before this Court—i.e., whether Girafa can state a claim based on the filing and prosecution of a lawsuit when that other lawsuit is still pending. In *Allergan Sales, Inc. v. Pharmacia & Upjohn Inc*., 1997 U.S. Dist. LEXIS 7648 at *9 (S.D. Cal. 1997), the United States District Court for the Southern District of California did decline to apply *PG&E* to a UCL claim based on another pending action on the basis that "Pacific Gas, however, did not address whether statutory claims under California's antitrust Cartwright Act and the Unfair Competition Act may only be brought after resolution in the claimant's favor in the underlying action." But *Allergan* is not controlling authority and it was incorrectly decided. The court in that case did not cite or discuss either *Rubin* or *Ludwig*, which dictate that a UCL claim is subject to *PG&E*.

PG&E presents an absolute bar to Girafa's UCL claim. It therefore has no probability of success on the merits and should be stricken.

2. Girafa Has Not Alleged Facts to Support a UCL Claim for "Unfair" Business Practices.

In its opposition, Girafa also argues that it has a probability of success on the merits because it has adequately alleged a claim for "unfair" business practices under the UCL.[2] This is not the case. Girafa has not alleged any threat to competition, and it has therefore failed to state a claim for relief.

In order to state a claim for "unfair" business practices, Girafa must allege "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law," or that "[the conduct] otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). In its opposition, Girafa relies on *In*

[2] Girafa does not argue that it has any probability of success on claims for fraudulent or unlawful business practices, and so these claims should be stricken outright.

re Acacia Media Technologies Corp., 2005 WL 1683660, 2005 U.S. Dist LEXIS 37009 (N.D. Cal. 2005), for the proposition that the bad-faith filing of a patent infringement suit is "unfair" because it is conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws ..., or otherwise significantly threatens or harms competition." *Id.* at 2005 WL 1683660 *5. Girafa also relies on *Handgards, Inc. v. Ethicon, Inc*., 601 F.2d 986, 993 (9th Cir.1979), which held that:

> [Patent] infringement actions initiated and conducted in bad faith contribute nothing to the furtherance of the policies of either the patent law or the antitrust law. The district court was correct in holding, in effect, that such actions may constitute an attempt to monopolize violative of Section 2 of the antitrust law.

Although bad-faith patent litigation may constitute a basis for an antitrust claim, it does not follow that every allegation of bad-faith patent litigation constitutes an antitrust violation or that such litigation necessarily runs afoul of antitrust law or policy. In *Handgards*, the patent litigation at issue was allegedly part of a scheme to monopolize an entire industry. The plaintiff alleged that the defendant "attempted to create a monopoly in the disposable glove industry by accumulating a number of the relevant patents no matter how weak or narrow and then instigating a series of lawsuits in order to slowly litigate the competition out of business." *Handgards*, 601 F.2d at 990. Similarly, in *Acacia*, the plaintiff alleged that the defendant had engaged in a pattern of filing baseless litigation "against Defendant and others in Defendant's industry." *Acacia*, 2005 WL 1683660 *5 (emphasis added).

There are no similar allegations in this case. Girafa instead alleges that Alexa initiated the Texas Action in order to retaliate against Girafa for filing an earlier lawsuit in Delaware and to divert Girafa's resources from the Delaware action. Girafa alleges that Alexa filed the Texas Action "to put extreme financial pressure on Girafa to gain improper business and litigation advantages and attempt to force Girafa out of business." (Opp. to anti-SLAPP at p. 11:11-19).[3]

The fact that Girafa might suffer some harm from the conduct alleged does not implicate

[3] Girafa also cites *Monolithic Power Systems, Inc. v. O2 Micro Int'l Ltd*. 2007 U.S. Dist. LEXIS 22556 (N.D. Cal. 2007), but admits that the defendant in that case did not dispute the issue of whether bad-faith patent infringement suits constitute "unfair" business practices. (Opp. to 12(b)(6) at p. 6:14-15). The case therefore has no relevance to the present motion.

antitrust law or policy. "[T]he antitrust laws are intended to protect the competitive process, not to protect individual competitors." *Lloyd Design Corp. v. Mercedes Benz of North America, Inc.*, 66 Cal.App.4th 716, 724 n. 6 (1998) (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342-345 (1990). If there is no actual or threatened harm to competition—as opposed to harm to an individual competitor—a practice does not give rise to liability under either antitrust laws or the UCL. *See Chavez v. Whirlpool Corp.*, 93 Cal.App.4th 363, 374 (2001) (upholding dismissal of both antitrust and "unfair" UCL claims based on lack of harm to competition).

Girafa has not alleged any threat to competition, but only to itself. As a result, Girafa has not alleged "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws" or "[conduct that] otherwise significantly threatens or harms competition," and it has no probability of success on a claim for "unfair" business practices. *Cel-Tech*, 20 Cal. 4th 163, 187 (1999).

3. Girafa Has Not Discharged Its Burden to Show a Probability of Success Against Niall O'Driscoll.

A large part of Girafa's opposition concerns specifics of the '548 patent at issue in the Texas Action. Girafa recites the history and scope of the patent, and uses it to argue that the Texas Action was initiated in bad faith. (Opp. to anti-SLAPP at pp. 13:7-20:13).

The factual points and evidence raised in this discussion have no bearing on Defendants' anti-SLAPP motion because Girafa has no legal basis for its claims. Alexa certainly does not agree with Girafa's claims about the validity of the Texas lawsuit and declines the invitation to litigate whether Girafa infringes the '548 patent and correspondingly what the proper claim construction is in the context of an anti-SLAPP motion especially when the claim itself is legally barred.[4] The Court need not reach any issue regarding the '548 patent or the motivation behind the filing of the Texas Action because, as previously discussed, the *PG&E* case is an absolute bar to Girafa's UCL claim and because Girafa has not adequately alleged a basis for "unfair" business

[4] On page 17 of its opposition, Girafa refers to certain evidence submitted in connection with the patent litigation currently proceeding in Delaware. Defendants note that the declarations to which Girafa refers were both filed under seal and any use of information contained in those declarations outside of the litigation pending in Delaware would constitute a violation of the protective order entered in the Delaware action.

practices under the UCL. When the appropriate time comes in Texas, Alexa will make the validity of its lawsuit clear, as it will be required to do. Finally, it goes without saying that when a party chooses to sue another for patent infringement it likewise runs the risk of becoming a defendant in a patent infringement action when its technology infringes.

It is equally noteworthy that Girafa does not argue or introduce evidence to show that Niall O'Driscoll personally acted in bad faith with respect to the filing and prosecution of the Texas Action.

Once a defendant establishes that a challenged cause of action arises from protected activity, the burden shifts to the plaintiff to establish the probability that it will prevail on the merits of its claims. Code of Civil Procedure §425.16(b). The plaintiff must establish—not just through argument but through admissible evidence—that the acts constituting the cause of action are not really privileged by the First Amendment or otherwise arising from protected activity ***and*** that the claim is otherwise meritorious. *Navellier v. Sletten*, 29 Cal. 4th 82, 94 (2002); s*ee also, e.g., Greka Integrated, Inc. v. Lowery*, 133 Cal. App. 4th 1572, 1581 (2005); *Peregrine Funding, Inc. v. Sheppard Mullin*, 133 Cal. App. 4th 658, 681-82 (2005).

Even assuming that Girafa's argument and evidence are sufficient to show a probability that Alexa filed the Texas Action in bad faith, Girafa makes no effort to show how or why Niall O'Driscoll would be personally liable. At the very least, in order to hold O'Driscoll liable under the UCL, Girafa must show that he "actively and directly participate[d] in the unfair business practice." *Bradstreet v. Wong*, 161 Cal.App.4th 1440, 1458 (2008). Girafa has made no effort to do so.

Girafa cannot simply rest on its allegation that O'Driscoll "knowingly encouraged, induced, authorized, aided and abetted the filing of the Texas action." (Complaint, ¶ 33.) Even if this allegation were sufficient to state a claim for UCL liability, Girafa has the burden to support this allegation with evidence. In opposing an anti-SLAPP motion, a plaintiff "cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence" to establish a probability of prevailing on the merits. *Roberts v. Los Angeles County Bar Ass'n*, 105 Cal.App.4th 604, 613-614 (2003).

Girafa has not attempted to introduce any evidence of O'Driscoll's involvement in any allegedly unfair business practice. The Court should therefore grant his special motion to strike for this separate and independent reason.

III. CONCLUSION

For the foregoing reasons, defendants Alexa and Niall O'Driscoll request that this Court grant their special motion to strike the third claim for relief set forth in Girafa's complaint without leave to amend. Defendants also request that the Court award them, pursuant to Code of Civil Procedure section 425.16(c), their reasonable attorneys' fees and costs in bringing this motion as authorized by that statute.

DLA PIPER US LLP

Dated: July 22, 2008

By /s/ Elizabeth Day
ELIZABETH DAY
elizabeth.day@dlapiper.com

Attorneys For Defendants
ALEXA INTERNET, INC. and NIALL O'DRISCOLL